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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. 356

STEPHEN ROBLEY EVANS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. .....

STEPHEN ROBLEY EVANS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner for a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on April 30, 1970; Petition for Rehearing denied June 5, 1970. See Appendix B to this Petition.

The Petition for Writ of Certiorari is filed within the required thirty days time.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

Constitutional questions are presented, involving both the First and Fifth Amendments: May an administrative agency validly promulgate a regulation [32 C.F.R. § 1625.2] that creates a deadline for filing information of a new status (in this case a status involving religion and conscientious belief) despite the absence of any time limitation set by the Act of Congress?

This was raised in the trial court, by Motion and in the Court of Appeals, by briefing.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the Fifth Amendment, the First Amendment and § 456 (j), of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.) and 32 C.F.R. § 1625.2 and § 1622.30. They are set forth in Appendix C.

5. STATEMENT OF THE CASE

The indictment charged Evans with a violation of the Universal Military Training and Service Act for refusing to submit to induction [CT. 2].

Evans pleaded "not guilty" and was tried by the Honorable Charles H. Carr, District Judge, sitting alone without a jury. He was found guilty and given a five year sentence.

6. THE FACTS

The facts are found in the complete Selective Service System file of the appellant.[1]

Petitioner registered with the Selective Service System [Ex. 1]. He was classified II-S while in college. He was reclassified I-A and on September 27, 1966 was sent an order to report for induction. His "acceptability" being undetermined he then asked the board for SSS Form No. 150 Special Form for Conscientious Objector which he filled out and promptly returned [Ex. 13].

As the Court of Appeals, in its opinion, put the facts on this phase of his processing:

> "The selective service file shows that Evans requested an SSS Form 150 (Conscientious Objector) on March 9, 1967. At that time he was subject to a prior order to report for induction. Form 150 was completed and presented to the board on March 15, 1967. The board, after considering the material submitted in the form, again classified Evans I-A. Evans was granted a personal appearance by the local board and thereafter appealed his classification to the state appeal board. On both occasions Evans was classified I-A." [p. 4 slip opinion].

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1. This file, Government's Exhibit 1, is pencil paginated at the bottom of each sheet and is hereafter referred to by sheet number.

As the record shows:

1. His Special Form made out a prima facie case, based on the standard of *Welsh* v. *United States*, ... U.S. ..... (June 15, 1970) See Ex. 71-76.

2. He submitted letters from professors, and others attesting to his sincerity. See Ex. 80-86.

He was given an opportunity to meet the local board but (1) was refused the opportunity to use two witnesses he had brought and (2) was jibed at when he answered the questions on self-defense "Oh, you'd just maim him." See Ex. 108-109.

He volunteered (on Form No. 151) for civilian work but his offer was rejected [Ex. 14]. Upon again being ordered to report for induction he refused to submit and prosecution followed [Ex. 15].

7. REASONS FOR GRANTING WRIT

A national decision is required on the constitutional problems present, ones that involve whether the Act of Congress giving conscientious objectors a draft status, and without time limitation for presentation, may be thwarted by an administrative regulation that creates a deadline for presentation of a new status.

Also involved is a consideration of the "in limbo" problem where one agency (the Selective Service System) will not consider a claim of new status presented to it after its deadline, the Order to Report for Induction, and the regulation of another linked-in-the-processing agency (the United States Army) will "not entertain" an application for separation, based on the status of conscientious objection, where such status had been presented to the Selective Service System.

8. ARGUMENT

I

Tension Between Act and Agency Regulation

Congress explicitly established conscientious objection and nowhere, even by implication, set a deadline for its presentation.

Petitioner refers to the dilemma involved in a confrontation between an Act of Congress and an agency regulation.

Congress by law clearly intended to expeditiously raise an army. But it is the will of Congress, by unequivocal expression in the law, that conscientious objectors should be exempt.

Congress declared in Section 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "Nothing contained in this Title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

It is true, as an early Supreme Court decision puts it "Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations." *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85, 53 S.Ct. 42, 44, 77 L.Ed. 175 (1932).

Yet one of the settled portions of constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that branch of government to

any other body or authority. As the Supreme Court stated it: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark,* 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36 L.Ed. 294 (1892).

But the President may prescribe administrative rules upon Congressional authorization. *United States* v. *Grimaud,* 220 U.S. 506, 521, 31 S.Ct. 480, 484, 55 L.Ed. 563 (1911). It is true in modern times that this doctrine has been widening, for as Mr. Justice Douglas declared, with only Mr. Justice McReynolds dissenting: "Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 398, 60 S.Ct. 907, 914, 84 L.Ed. 1263 (1940).

Yet despite the widening it is still a clear principle of constitutional law that the President may not legislate contrary to Congressional law.

As the Supreme Court declared in *Koshland* v. *Helvering,* 56 S.Ct. 767, 298 U.S. 441, 80 L.Ed. 1268, 105 A.L.R. 756 (1936): "Where provisions of a statute are unambiguous and its directions specific, the statute cannot be amended by regulation." For, as the Court pointed out, "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Dixon* v. *United States,* 85 S.Ct. 1301, 381 U.S. 68, 14 L.Ed.2d 223 (1965). Speaking for the Court at 1304, Mr. Justice Brennan then went on to declare: "A regulation which does not do this,

but operates to create a rule out of harmony with the statute, is a mere nullity."

Pursuant to the delegated powers in the Act, regulations were adopted for administrative procedures. 10 (b) 1 of the Act provides: "The President is authorized—to prescribe the necessary rules and regulations to carry out the provisions of this title."

The regulations, promulgated by the President, provide procedures for determining the merit of claims for deferment. Those procedures provide that the registrant may ask for a face to face confrontation with the local board and, if it rejects his claim, for a review of his file by the State Appeal Board. A short cut, one that does not offer him either, or both, of these avenues of relief is unlawful.

It is submitted that the provision of the Act concerning conscientious objectors is unambiguous and its direction specific.

A pertinent restatement of it is found in the Department of Defense directive to all the eleven armed services:

> ". . . the Congress, as indicated by provisions of P.L. 90-40 (reference (c)) and related statutes, has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces. . . ." [DoD Directive No. 1300.6]

It is clear that Congress put no time limit on the presentation of such a claim. Any administrative inconvenience that results from "late" filing is to be remedied by Congress, not by the agency. Every agency, and this one, certainly has administrative inconveniences and frustrations. There is no legal excuse for short cuts to avoid them, in the face of Congressional intent.

Neither the President nor his representative can nullify the will of Congress by prescribing regulations which are contrary to the intent of the statute enacted by Congress.

In regard to conscientious objectors, it is submitted that 32 C.F.R. § 1625.2 is contrary to Congressional will as enacted into law and hence null and void.

Congressional policy against requiring combatant training and service of those conscientiously opposed to participation in war is one of long standing. *Seeger* v. *United States*, 380 U.S. 163 (1965). It finds its counterpart in the policy of the armed forces that conscientious objectors should be discharged from service or assigned noncombatant duty.

Although we are not here dealing with an "all fours" *Ehlert*-type situation the rationale is much the same: the conflict between the "open-end" Act of Congress and the deadline setting agency regulation.

The majority opinion in the "controlling" case, *Ehlert* v. *United States*, 9 Cir., 1970, ... F.2d ....., 2 SSLR 3495, recognizes that many of the Courts of Appeals differ on this point and states

> "Whether the crystallization of a conscientious objection to war can constitute a circumstance over which the registrant has no control is a question upon which the circuits have disagreed. Upon the affirmative side, among others, are *United States* v. *Sandbank*, 403 F.2d 38 (2d Cir. 1968), *cert. denied* 394 U.S. 961 (1969); *United States* v. *Gearey*, 368 F.2d 144 (2d Cir. 1966), *cert. denied* 389 U.S. 959 (1967), *rehearing denied* 389 U.S. 1010 (1967), and *Keene* v. *United States*, 266 F.2d 378 (10th Cir. 1959)."

The minority opinion in *Ehlert*, Judge Merrill speaking, with the four other dissenting circuit judges concluded that "I would hold the regulation to be contrary to statute and invalid." The majority had held that a change in a registrant's status (after he had received an induction order) to that of a conscientious objector was a situation over which registrant had control, *but it did not concern itself at all* with the point we advance.

As Judge Merrill stated in *Ehlert*:

> "Legislation creating this exemption from military service, 50 U.S.C. App. § 456 (j), provides for no such limitation. The enforcement of orderly procedures may well require default to be imposed for failure of a registrant to claim in timely fashion. But here the limitation is not based on procedural default. It acts upon the substance of the status itself, and serves to diminish what Congress has bestowed. I regard it as beyond the rule-making power of the System so to exclude from application of the exemption anyone who by virtue of his status is entitled to it under law; or, for reasons of expediency, to relieve itself from the onus of its clear obligation to entertain timely claims of status on the part of registrants not yet inducted into military service."

Concerning conscientious objection, it is clear that the Congressional statute states and defines the rights of the registrant and fixes a standard by which such rights are to be measured.

The regulations constitute a step in the administrative process, but they cannot alter the Congressional will as expressed by statute. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 56 S.Ct. 391, 80 L.Ed. 528 (1936); *Dixon* v. *United States*, 85 S.Ct. 1301, 381 U.S. 68, 14 L.Ed.2d 223 (1965).

The President himself recognizes the authority of Congress in this regard. For example, under the Military Selective Service Act of 1967, the President realized he had not been given power to institute a random selection system to draft registrants into the armed services. Possibly because such a matter involved *all* registrants (and conscientious objection only a few). In any event the President requested Congress to change the law. The President recognized that the wise and legal course was not to change the law by new regulations. Congress passed the Selective Service Amendment Act of 1969 (P.L. 91-124) and the President signed it on November 26, 1969.

Another example to prove the point was the seizure of the steel mills of the country by President Truman on April 8, 1952, in a labor dispute. In that situation the Supreme Court held that the President could not act contrary to Congressional will. The President had no power to seize the mills without Congressional authorization. When Congress passed the Taft-Hartley Act in 1947, Congress refused to authorize governmental seizures of property as a method of preventing work stoppages and settling labor disputes. The power that the President exercised was lawmaking power, which the Constitution vests in the Congress alone. It is the function of the President to take care that the laws be faithfully executed, not act contrary to Congressional will as expressed by law.[2] *Youngstown Co.* v. *Sawyer,* 343 U.S. 579 (1952).

In regards to exemption of conscientious objection, the will of Congress is clear. It is stated by a clear, definite, unambiguous statute.

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2. Mr. Justice Frankfurter stated at page 602: "Congress has expressed its will to withhold this power [of seizure] from the President *as though it had said so* in so many words." [Italics supplied].

We have the same situation in this draft case.

Once the will of Congress is expressed by law, the President can implement that will by rules and regulations. He cannot, by regulation, legislate contrary to that will.

It may be true, as Professor Kenneth Davis has pointed out (*Administrative Law Treatise*, Volume 1, Section 5:09), that at certain times ascertainment of the intention of Congress in regards to a statute may be impossible. But such is not the case here.

In regards to conscientious objectors the language of the law is clear. The President by regulation cannot change substantially what Congress has willed by law. In regards to conscientious objector registrants 32 C.F.R. § 1625.2 is contrary to the statute and hence invalid.

II

Some Draft Cases Already Support the View That This Act Must Take Precedence Over § 1625.2

There is no need to recite *Gearey* or similar opinions for they are listed in the majority's slip opinion, on page 333, *Ehlert* v. *United States*, 9 Cir., 1970, 422 F.2d 332.

One not listed gives the rationale well:

The facts of it are that on January 29, 1951, a registrant named Clark mailed to the board a request for appeal from their ruling on his claim. This notice was received by the board on February 3, 1951. Prior thereto, on February 2, 1951, the board mailed a notice to the defendant to report for induction [p. 614].

The opinion says:

"Although the regulations, literally construed, tend to support this position, we think that a right of appeal

does exist in this case. An Act of Congress creates that right without any express limitation, and it seems unreasonable to hold that Congress intended the right of appeal to exist only where the claim for exemption as a conscientious objector was considered at the time of the initial classification. This would be the result in effect if we accept the Government's contention. The right of appeal would exist only in cases where the claim is considered at the time of the initial classification; in all other instances the local board would be able to determine whether a claimant should have an appeal merely by framing its order as a refusal to reopen the original classification rather than an order granting a reopening of the classification on which a hearing would be held and the right of appeal from an adverse determination granted." *United States* v. *Clark,* W.D.Pa., 1952, 105 F.Supp. 613, 615.

III

The Sixth Amendment Right to Counsel Applies to Administrative Proceedings in the Selective Service System

The regulations of this administrative agency forbid the registrant to bring his attorney to his meeting with the board. 32 C.F.R. § 1624.1(b).

A very recent case supports our contention that denial of counsel violated petitioner's rights:

United States v. *Weller,* No. 42614 (N.D.Calif., Sept. 19, 1969) 2 SSLR 3229.

Referring to Selective Service Regulation 1624.1(b), which states, ". . . no registrant may be represented before the local board by anyone acting as attorney or legal counsel." Judge Peckham declared in *United States* v. *Weller* (at 2 SSLR 3231) that the denial of the right of counsel was not authorized by Act and that the registrant

had a right to counsel at his personal appearance before his board. Judge Peckham stated, "Accordingly this Court is loathe to hold that the administrative denial of such a right is either authorized by Congress or is constitutional." 2 SSLR 3229 at 3231.

It is submitted that petitioner was prejudiced by said denial of counsel, that his constitutional rights were violated by the action of the local board. A thorough analysis of this position is accomplished by Judge Peckham's opinion in *Weller.*

IV

Refusal of the Local Board to Hear Defendant's Proffered Witnesses Was a Violation of the Right to a Fair Hearing

" 'Due process' is a procedure which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial [or fair hearing]." *Sexton* v. *Barry,* 223 F.2d 220, certiorari denied 77 S.Ct. 94, 352 U.S. 870, 1 L.Ed. 2d 76. Constitutional guaranty of "due process of law" requires observance of those general rules established in our system of jurisprudence for the security of private rights in any proceeding which may result in depriving a person of life, liberty or property. U.S.C.A., Const. Amend. 5; *U. S.* v. *Kuwabara,* 56 F.Supp. 716. The absolute fundamentals of "due process of law" are jurisdiction, adequate notice, and a fair hearing. U.S.C.A., Const. Amend. 5; *U. S.* v. *Parcels of Land in Prince George's County, Md.,* 40 F.Supp. 436. In regard to "due process," it should be pointed out that the constitutional provision for security of person and property should be liberally construed. U.S.C.A., Const. Amends. 4, 5; *U. S.* v. *Wheeler,* 149 F.Supp. 445.

We submit that fairness and justice require that the local board grant the registrant a full and fair hearing on

his claim. Evidence which has bearing on a registrant's claim should not be excluded.

In the present instance it was essential to a full and fair hearing that his two witnesses be permitted to appear before the local board.

The value of a personal appearance before a local board for one claiming a I-O classification is beyond need of argument. So also is the value of the hearing being fair when the registrant has been granted said personal appearance. *Simmons* v. *United States,* 348 U.S. 397 (1955).

The local board was guilty of an abuse of discretion and demonstrated its arbitrariness, when without reason it denied appellant the right to present witnesses vital to proof of his claim.

There are three unreported cases that support this position. Their rationale is persuasive. Two are annexed as Appendices D and E. The third, a very recent one, is *United States* v. *Molchak,* C.D. Calif. No. 4691, Feb. 2, 1970. Here Judge Jesse W. Curtis said:

> "THE COURT: Gentlemen, in this case it seems to me that the registrant's statement of his basis for a conscientious objector status is prima facie sufficient.
>
> It would seem to me that if it were to be denied, the only basis, if ever, for denying it would be one of two grounds:
>
> One would be a lack of training which seems to be the basis upon which the Board turned it down. They seemed to think there was a lack of religious training here.
>
> The other one is possibly his insincerity.

> Taking the last one first, it seems to me the Board cannot rely upon insincerity in a case where the registrant has appeared for a hearing with witnesses who are there to testify for his sincerity or as to his insincerity. If that were the question it would seem to me the Board is duty bound to listen to his witnesses in that regard, and when they do not they are therefore foreclosed from refusing his classification as a CO on that ground."

We submit that Evans' right to a fair hearing was violated by the action of the local board in excluding his witnesses.

CONCLUSION

For the above given reasons certiorari should be granted and the judgment should be reversed.

Respectfully,

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July 5, 1970.

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

vs.

STEPHEN R. EVANS,
Appellant.

No. 24,451

[April 30, 1970]

APPEAL FROM THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Before: ELY and CARTER, Circuit Judges, and JAMESON,* Senior District Judge.

JAMES M. CARTER, Circuit Judge:

Evans was indicted for violation of the Universal Military Training and Service Act, 50 App. U.S.C. § 462, for his refusal to be inducted. He waived jury, was convicted and appeals. We affirm.

Evans' opening brief raised two basic contentions:

(1) The order to report for induction was invalid; but if on the other hand, the order was valid, he had no continuing duty to report.

(2) Evans' constitutional rights were violated in the denial of his requests to have an attorney present and to call witnesses at his hearing before the draft board.

---

*Hon. William J. Jameson, Senior District Judge, District of Montana, sitting by designation.

New counsel filed Evans' reply brief and raised an additional contention, that Evans submitted a prima facie case for a I-O classification and the board should have so classified him.

I

THERE WAS A VALID ORDER TO REPORT FOR INDUCTION AND REGISTRANT WAS UNDER A CONTINUING DUTY TO REPORT.

The Selective Service file received in evidence below shows that Evans was originally ordered to report for induction October 26, 1966. Prior thereto on August 22, 1966, he had been ordered to report for a physical examination. A Statement of Acceptability (DD Form 62) dated September 2, 1966, finding him fully acceptable for induction, was mailed to him on September 21, 1966. The actual induction was not completed pending "clearance of . . . records." The clearance reaffirmed that Evans was fully acceptable and he was so notified.

Subsequently on February 27, 1968, Evans was duly ordered to report for induction on March 27, 1968. On March 19, 1968, he was ordered to report to the Examining Station for further processing, and on March 29, 1968 was again found fully acceptable for induction. On May 28, 1968 Evans was informed by letter that he was still "under this original order" of February 27, 1968 and was ordered to report for induction on June 18, 1968. Evans was not confused or mislead. He reported on June 18, 1968 but refused to be inducted. The prosecution and conviction were based on this refusal.

Evans first complains that a Statement of Acceptability (DD Form 62) was not mailed to him 21 days prior to his induction date. 32 CFR § 1631.7(a) requires such mailing.

Evans' Selective Service file indicates that between September 2, 1966 and June 18, 1968, a variety of challenges to Evans' acceptability were raised. However, the Statement of Acceptability of September 2, 1966, mailed to Evans on September 21, 1966 was never retracted. In such a situation only one Statement of Acceptability need be mailed to the registrant. It therefore appears Evans knew of his acceptability over a year before the receipt of the February 27, 1968 order to report.

Evans is unable to provide any authority to support his contention that the March 19, 1968 order to report to the Examining Station for further processing somehow invalidated the earlier valid Statement of Acceptability. This action was within the discretion of the local board and was not violative of any selective service regulation. We therefore find that on February 27, 1968 Evans was issued a valid order to report for induction.

Evans next contends that the May 28, 1968 letter did not validly revive the February 27 order to report one month later. In support of this position, Evans cites 32 CFR 1632.14(a).

That section provides in part, "If the time when the registrant is ordered to report for induction is postponed, it shall be the continuing duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains." (As to the continuing duty to report, *United States v. Prince*, (2 Cir. 1968) 398 F.2d 686; cert. denied 393 U.S. 946 (1968);

Kariakin v. United States, (9 Cir. 1958) 261 F.2d 263.) Nothing in the regulations suggests that a new order is required. 32 CFR 1632.2(d) specifically provides that no new order is required in cases of formal postponements.

Evans seeks support from 32 CFR 1632.2. The section provides for postponement of induction in certain cases of personal or family illness. A formal postponement procedure is established. Evans contends that a postponement of induction may only take place pursuant to these provisions. We do not so read the regulations.

II

REGISTRANT WAS NOT ENTITLED TO AN ATTORNEY NOR TO WITNESSES AT THE HEARING BEFORE THE BOARD.

32 CFR 1624.1(b) provides in part, ". . . [N]o registrant may be represented before the local board by anyone acting as attorney or legal counsel." We have held that the proceeding before the board is non-judicial and non-criminal. There is no justification to extend the right to counsel to such proceedings. *Haven v. United States,* (9 Cir. 1968) 403 F.2d 384, cert. denied 393 U.S. 1114 (1969). Other Circuits have so held. *Nickerson v. United States,* (10 Cir. 1968) 391 F.2d 760, cert. denied 392 U.S. 907 (1968); *United States v. Capson,* (10 Cir. 1965) 347 F.2d 959, cert. denied 382 U.S. 911 (1965); *Imboden v. United States,* (6 Cir. 1952) 194 F.2d 508, cert. denied 343 U.S. 957 (1952).

32 CFR 1624.1(b) provides in part, "No person other than a registrant shall have the right to appear in person before the local board . . .". Since the proceeding is non-judicial in nature, the registrant is not entitled to have witnesses testify in his behalf. *United States v. Nugent,* (1953) 346 U.S. 1, 8; *Uffelman v. United States,* (9 Cir. 1956) 230 F.2d 297, 303.

THERE WAS NO ERROR IN DENYING REGISTRANT A I-O CLASSIFICATION

At oral argument Evans' new counsel raised the contention that there was no basis in fact for the local board's decision to classify Evans I-A in view of his having made a prima facie case as a conscientious objector. This contention had been only briefly alluded to in prior appellate proceedings.

The selective service file shows that Evans requested an SS Form 150 (Conscientious Objector) on March 9, 1967. At that time he was subject to a prior order to report for induction. Form 150 was completed and presented to the board on March 15, 1967. The board, after considering the material submitted in the form, again classified Evans I-A. Evans was granted a personal appearance by the local board and thereafter appealed his classification to the state appeal board. On both occasions Evans was classified I-A.

The ultimate question in a registrant's claim for conscientious objector classification is his sincerity in objecting on religious grounds to participation in war in any form. This is purely a subjective question. *Witmer v. United States,* 348 U.S. 375, 381 (1955). Any fact which casts doubt on the veracity of the registrant is relevant and is affirmative evidence that he has not painted a full and accurate picture. *Witmer,* supra, 381-82.

When Evans filled out his original questionnaire in 1962, in the section concerning conscientious objection, he had written "Does not apply." When he was first ordered to report for induction in 1966 he raised no conscientious objection claim, but only requested a postponement of induction.

From his SS 150 and his interview with the board, the board could rightfully have concluded and did so conclude

that Evans was raising only his personal and moral objections to war, not ones based on religious training or belief, as defined in *United States v. Seeger,* 380 U.S. 163 (1965). Evans, in his SS 150, stated his belief was "the result of 24 years of experience and exposure and is a conclusion that takes into account all things to which I have been exposed (as is common with any religious belief)". There was no claim of religious training. At his hearing he admitted he would use force in certain circumstances. His summary of his appearance before the board sent in by letter, stated that "life is the one sacred entity and that it must be preserved at all costs . . . War destroys life." Evans' credibility and demeanor were for the board to pass on. *White v. United States,* (9 Cir. 1954) 215 F.2d 782, cert. denied 348 U.S. 970 (1955).

In conclusion, we find no error by the board that would require reversal of Evans' conviction. The judgment is Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, June 5th, 1970

Before: ELY and CARTER, Circuit Judges, and
JAMESON, Senior District Judge

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed May 12, 1970 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX C

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

CRIMINAL PROCEEDINGS AND CONDEMNATION OF PROPERTY

[SECTION 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Proposed September 25, 1789; ratified December 15, 1791.

Congress declared in Section 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "Nothing contained in this Title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Congress declared in Section 1 of the Act: "Policy and intent of Congress:

> "(c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Section 1625.2 of the Selective Service Regulations (32 C.F.R. § 1625.2 (E. O. 10292, 16 F. R. 9862, Sept. 28, 1961)) provides:

> *"When registrant's classification may be reopened and considered anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; *provided,* in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

8173

UNITED STATES OF AMERICA,
Plaintiff,

vs.

KEITH NORMAN GLESSING,
Defendant.

Minneapolis, Minnesota, November 30, 1951.
Before Judge Matthew M. Joyce.
G. Frandle, Reporter.

THE COURT: I am obliged to you gentlemen, both of you, for the conduct of the trial of this case which hasn't taken very long. You have supplied me with material and information and knowledge which I think will be of benefit to me always.

* * *

I don't think there was any misrepresentation at all and I think that while it isn't for me to determine what the preponderance of the evidence may be, I can't avoid that feeling that it looks to me as though there was a misconception. Take that for what it is worth. Why this Board didn't hear these three witnesses that the young man brought in I don't know. I don't know whether their story would have been an elaboration of what he had already

told the Board or if it was supporting testimony which might have gone into greater detail than he had presented which might have disclosed facts which if the Board knew them might have caused them to change his classification. It doesn't seem to me that it is quite the American way to slap down a man and say we won't hear you at all about this thing. He was there; he was earnest; he was trying to get their story to the Board. What the story was I don't know. He doesn't know now because he wasn't permitted to use them and the Board doesn't know or didn't know because the Board wouldn't proceed to hear them.

* * *

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

No. 32,390

UNITED STATES OF AMERICA

VS.

WALTER KOBIL,
Defendant.

Transcript of proceedings on direction of verdict in the above entitled cause before Hon. FRANK A. PICARD, District Judge, at Detroit, Michigan, on Thursday, September 13, 1951.

APPEARANCES:

Kenneth W. Smith, Assistant United States Attorney, Appearing on behalf of the United States.

Hayden C. Covington and Harold E. Leithauser, Appearing on behalf of the Defendant.

Detroit, Michigan. Thursday, September 13, 1951. 9:30 o'clock A. M.

* * *

We come down to today, and they classify him not as a conscientious objector. What they classified him on in the first place, I don't know; there isn't anything in that file so far as I know that placed him in anything except being a conscientious objector at that point.

But that is sort of a temporary classification. He has got ten days in which to say, "Well, I want to be heard." He said he wanted to be heard. He came down there with two witnesses. They wouldn't let his witnesses in.

That was wrong, unless it appeared that his witnesses were creating some kind of a disturbance or were there for the purpose of preaching Jehovah's Witness doctrines. But they might have been there to show that he was on the corner and sold tracts, or that he went from door to door, and they might have been there for the purpose of showing that he was a conscientious objector and yet the board never heard them. That is wrong; absolutely wrong and unAmerican. The boards might as well find it out now as at any time.

Now, the fact that this man won't salute the flag makes my blood boil; and that he won't fight for his country also makes my blood boil. But that hasn't anything to do with

this, with you and me. I am the Judge; I have got to follow the law as it is in making a decision—not my natural tendencies, because he probably would have been in jail long ago if I had been permitted to follow my natural tendencies. That isn't it.

* * *

But it was absolutely without any basis in fact and there was no right for this draft board to classify him as 1-A. What they should have done, in my opinion, is to have made further inquiry that gave them that right. There is nothing I have here to show and nothing they have that shows it if they did.

He is a conscientious objector. The worst he should have gotten from his angle was to have been classified for non-combatant service as a conscientious objector. If he was a conscientious objector, no matter what they found, they could have classified him as a conscientious objector and could have classified him for non-combatant service.

Therefore, I instruct this jury to find a verdict of not guilty.

You will take the verdict.

(Verdict taken.)

* * *